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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CHRISTOPHER GONYER,

4 Plaintiff,

5 v.

13 CV 8488 (RJS)

6 VANE LINE BUNKERING, INC.,

7 Defendant.

8 -----x  
9 New York, N.Y.  
June 4, 2014  
1:30 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN

12 District Judge

13 APPEARANCES (Via Telephone)

14 FITAPELLI & SCHAFFER LLP

15 Attorneys for Plaintiff

16 BY: JOSEPH A. FITAPELLI

17 -and-

BRUCKNER BURCH PLLC

18 BY: RICHARD JENNINGS BURCH

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Attorneys for Defendant

20 BY: MARK A. BECKMAN

VINCENT MANTELLA AVERY

21 -and-

VENABLE LLP

22 BY: BRIAN JASON TUROFF

RONALD WAYNE TAYLOR

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(In chambers; all counsel appearing via speakerphone)

THE COURT: Hello, counsel.

This is Judge Sullivan.

I am here with the court reporter. I have a trial going, so I am doing this during lunch. Thanks for gathering.

Let me just take appearances.

This is Gonyer v. Vane Line Bunkering, 13 Civ. 8488.

Could I take appearances for the plaintiff?

MR. BURCH: Good morning, your Honor -- afternoon where you are.

This is Rex Burch for the plaintiff Gonyer.

THE COURT: OK, Mr. Burch.

MR. FITAPELLI: Joseph Fitapelli for the plaintiff Gonyer.

THE COURT: OK, Mr. Fitapelli.

For the defendants?

MR. BECKMAN: This is Mark Beckman, and my colleague Vince Avery at Gordon & Rees for defendant.

Your Honor, we also have co-counsel on the line.

THE COURT: Who is that?

MR. TUROFF: Brian Turoff for Venable.

And I am joined by my colleague Ron Taylor with Venable as well.

THE COURT: Good afternoon to all of you.

Since it is virtually all men on this line could I ask

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1 everybody to identify themselves each time they speak so that  
2 the court reporter can make sure that she gets the correct  
3 attributions for each of the statements.

4 I am in receipt of the parties' correspondence on  
5 this. It is sort of an interesting issue. It does seem to me  
6 that we have a Rule 68 offer and acceptance by the only  
7 plaintiff in this case, right?

8 MR. BECKMAN: This is Mark Beckman.

9 And that is correct, your Honor.

10 MR. BURCH: This is Rex Burch.

11 That is incorrect, your Honor.

12 THE COURT: Why is that incorrect?

13 MR. BURCH: Because prior to the acceptance of the  
14 offer of judgment, there were several plaintiffs who filed  
15 consents to join this action, and under Myers v. Hertz from the  
16 Second Circuit in, I believe, 2012, they are now considered  
17 parties to the case.

18 THE COURT: This is before there has been a  
19 certification of a collective action?

20 MR. BURCH: Correct.

21 This is Rich Burch again.

22 If you will check out Myers v. Hertz Corporation, 624  
23 F.3d 537 at 555.

24 THE COURT: Right. What about it?

25 MR. BURCH: You will see that there is nothing in the

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1 text of the statute -- and they are referring to the FLSA --  
2 that prevents plaintiffs from opting in to the action by filing  
3 consents with the District Court, even though the notice  
4 described in Hoffmann-La Roche had not been sent.

5 And they go on to note that conditional certification  
6 is not required for plaintiffs to join an FLSA case. That is  
7 in fact the overwhelming majority rule in the federal courts.  
8 There are one or two courts from outside the Second Circuit  
9 that have said something wonky on that issue, but that is the  
10 overwhelming rule.

11 So what we have is a collective action where three  
12 votes joined -- I believe it was all three -- prior to the  
13 acceptance of the offer of judgment. One plaintiff,  
14 Mr. Gonyer, has accepted an offer of judgment and, therefore,  
15 we need to replace the named plaintiff.

16 And that's an easy answer.

17 MR. BECKMAN: If I may, your Honor, this is Mark  
18 Beckman for defendant.

19 THE COURT: Yes.

20 MR. BECKMAN: Among other things, the notices didn't  
21 appear on their face to be satisfactory in this particular  
22 case -- they weren't notarized -- any of the usual things one  
23 looks at. But more importantly, you need to actually join them  
24 only after a motion for leave to amend has been made and  
25 granted in the first place -- none of which had happened. That

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1 was all premature.

2 At the same time of doing that, they had sent a letter  
3 to the Court saying they were accepting the offer. So I am not  
4 sure that what Mr. Burch is talking to you is necessarily  
5 typical here.

6 Having also said that, as made clear in the letter we  
7 sent to you, there is no case to amend. There is no party to  
8 join in the matter here. This is over. The judgment has been  
9 rendered. There is only the ministerial duties of determining  
10 fees and directing the clerk to enter judgment officially.

11 There is certainly no prejudice to any of the  
12 potential plaintiffs, if there are -- again, we are not  
13 convinced that that is necessarily true, it is people who just  
14 said that, maybe they would consent to this or some other case.  
15 To the extent that they do exist and do think that they have a  
16 claim, they are free to file them at some date in the future at  
17 their convenience.

18 Conversely, to the extent that this is happening the  
19 way that plaintiff is describing, that would be significantly  
20 prejudicial, materially prejudicial to defendants who made a  
21 deal and now we are going to be charged the cost of that deal,  
22 have to pay the money and not get the benefit of the deal. The  
23 case is not over and resurrected post judgment. So to us it  
24 seems it is something that is no longer a discretionary call,  
25 this is, as a matter of law, a closed case.

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1 THE COURT: I have not looked at this Myers v. Hertz  
2 case. I guess I want to see that.

3 But, certainly, it seems to me what you are saying,  
4 Mr. Burch, you don't need to amend because you can add  
5 plaintiffs at any time under Myers v. Hertz without amending,  
6 is that right?

7 MR. BURCH: We do need to amend because the named  
8 plaintiff has to be replaced. Obviously, Mr. Gonyer is not  
9 going to pursue. But I think if you will look at the Second  
10 Circuit's decision in Comer v. Cisneros, which is 37 F.3d 775  
11 at 799 (2d Cir. 1994), that one of the ways that this sort of  
12 mandatory dismissal that Mr. Beckman is talking about can be  
13 avoided is if another plaintiff has intervened. And it would  
14 seem to me that a plaintiff that has joined, as permitted under  
15 29, U.S.C, 216(b), Anna Myers v. Hertz Corp case, that you can  
16 replace the named plaintiff -- this is just not that unusual a  
17 scenario where you have something happen with a named plaintiff  
18 and another plaintiff who is already part of the case takes  
19 over.

20 MR. BECKMAN: Again, this is Mr. Beckman.

21 But nobody has actually intervened. I think there is  
22 some level of fudging the times and the dates and the  
23 procedural posture. There have been notices of some sort put  
24 in saying that there are people who may exist who may have  
25 claims, but no one actually is in the room here.

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1 And, also, my understanding of the Myers case that Mr.  
2 Burch is mentioning, that is a case where there was a class  
3 certification motion, and in fact that is what that decision  
4 was about, a class cert situation. So it is not the same  
5 situation here.

6 Finally, in order to allow someone to intervene, in  
7 order to allow someone to join a case, you have to have a case.  
8 Once judgment has been rendered, as here, that is just not the  
9 fact. That doesn't exist anymore. They are these people, if  
10 they have claims they can file and the next judge will deal  
11 with them, I am sure, perfectly capably, but for now for  
12 Mr. Gonyer, this matter is over.

13 THE COURT: When did it become over, in your view?

14 MR. BECKMAN: When they served -- when they filed and  
15 served their notice of acceptance of appearance -- acceptance  
16 of the offer.

17 MR. BURCH: This is Rex Burch.

18 Of course, by that point other plaintiffs have joined  
19 as permitted.

20 I would just like to say, Myers v. Hertz Corporation  
21 says that the "certification," which I guess is what Mr.  
22 Beckman is making reference to with respect to a collective  
23 action "is neither necessary nor sufficient for the existence  
24 of a representative action of the FLSA."

25 The conditional certification process, as the Supreme

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1 Court noted just last year in the Genesis case, the purpose of  
2 that is only for the issuance of a court approved notice. It  
3 does not have to do with the joinder of additional plaintiffs.

4 Now, additional plaintiffs may join as a result of  
5 that notice going out, but it is the filing of a consent which  
6 these plaintiffs have absolutely done -- and let me just say  
7 that I find that the argument that they are making that these  
8 people's consents are not sufficient to be less than  
9 meritorious -- let me dial that back a little bit -- less than  
10 meritorious. There is no question that these folks have joined  
11 this case. So what we have is some defendants who are, like,  
12 hey, let's start a whole new case for people that they admit  
13 have claims and who could file suit so that the defendant will  
14 have exactly the same lawsuit except for all of the work that  
15 we will have done, that we have done to date will have been for  
16 nothing.

17 MR. BECKMAN: Mark Beckman --

18 MR. BURCH: I am not done yet, Mr. Beckman. I  
19 apologize in advance.

20 So it would seem to me that unless they can establish  
21 that as a matter of law your Honor doesn't have jurisdiction to  
22 allow this case to continue, that none of the equities weigh in  
23 favor of cutting this case off. The cases will be re-filed.  
24 We will mark them as related cases, which we are required to  
25 do. They will show back up on your desk and we will just start



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1 this whole process again. That is grossly inefficient. And  
2 for the reasons that I think I have already outlined, it is  
3 just not necessary in this case because folks have joined and  
4 there are plaintiffs that can replace Mr. Gonyer.

5 THE COURT: Look. It seems to me that the  
6 jurisdictional question is the question, no doubt about that.

7 And it seems to me that once the offer is accepted,  
8 then the entry of a judgment is a ministerial act. The case  
9 law is clear on that. So then the case is over. So that's  
10 where I started with this. I have not looked at the Myers v.  
11 Hertz case yet. So it does seem to me that I have to take a  
12 look at that case.

13 I'm a little curious about the timing of the  
14 acceptance and then the additional plaintiffs who are coming  
15 forward. And if the timing of the acceptance was delayed in  
16 order to line up other plaintiffs, that would strike me as  
17 troubling, and maybe I need to have a factual hearing on that  
18 to figure out when the offer really was accepted and whether  
19 counsel played a role in preventing that acceptance from being  
20 communicated in order to line up other plaintiffs.

21 But I do agree that if I find that I don't have  
22 jurisdiction, the upshot of all of this is that the new  
23 plaintiffs -- if that's what we are calling them -- can just  
24 file suit and we would be right back in court, and we would  
25 probably pick up right where we left off.

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1           You agree with that, Mr. Beckman?

2           MR. BECKMAN: Yes and no, and I want to qualify that a  
3 bit.

4           I do want to relate one thing -- a couple of things --  
5 to what Mr. Burch said.

6           We emphatically do not admit that any of these people  
7 actually have a claim or should file a claim. I was simply  
8 saying hypothetically that if they think they do, nothing  
9 prevents them from so filing. Like we said with Mr. Gonyer and  
10 otherwise, we don't think any of them have claims. We just  
11 made certain decisions and we are where we are.

12           Having said that, as your Honor mentioned at the  
13 beginning just now, we don't think there is a case. The law  
14 seems abundantly clear that with the acceptance and the service  
15 of the acceptance, the case ended, so there is no jurisdiction.

16           Finally, the last point about what would happen going  
17 forward, I know Mr. Burch made some argument about all the  
18 inherent inefficiencies but, frankly, very little practically  
19 has gone on. I don't necessarily think that there is any  
20 reason to believe any one court rather than another is  
21 necessary -- the reality is, if these other people decide to  
22 file a case, when they come, we deal with it. The fact that  
23 they may suffer from similar issues and perhaps have the same  
24 lawyers, doesn't necessarily to me or any of us weigh toward  
25 any kind of future disposition.

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1 THE COURT: There is a related case rule in this  
2 district. I assume everybody is familiar with it or will take  
3 a look at it, but there is a good chance that it would come  
4 back to me as a related case, right?

5 MR. BECKMAN: There is certainly a chance. I get why  
6 plaintiff is suggesting that, but there has been very little  
7 inherent knowledge. We had one hearing and, obviously, very  
8 little if any of the discovery is done. In the end, it would  
9 depend on the allegations of the complaint.

10 THE COURT: No, it wouldn't. You are talking just off  
11 the cuff here. Have you read the local rule for the  
12 distribution of cases?

13 MR. BECKMAN: I have, your Honor, although not for  
14 today.

15 THE COURT: It doesn't turn on just what happens in a  
16 complaint, it turns on a number of things.

17 I guess one could also argue that your offer of  
18 judgment was designed to get this away from me, and that would  
19 be a factor to be considered in any decision on any related  
20 cases filed.

21 All of this smacks of cuteness, I have to say, but we  
22 are in this posture. So there has been an offer. There has  
23 been an acceptance. And then there are these -- I will agree  
24 with Mr. Beckman on this -- it seems to me that the consents  
25 that have been signed by these other individuals are vague to

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1 the point of troubling as to whether they even know what this  
2 case is about, whether they understand what the cause of action  
3 is. The reason we have certification under the FLSA and a  
4 process devised to make sure that it goes out in a certain way  
5 is to make sure that plaintiffs or potential plaintiffs know  
6 what they are doing before they opt in.

7 So all right. I guess that I am going to do this. I  
8 think I want to reserve. Anybody wants to submit some  
9 additional briefing in light of the cases that Mr. Burch has  
10 been spouting for the first time, I will let you do that. But  
11 I guess that I would like that by Friday and then I will rule  
12 shortly after that. OK.

13 So any additional submissions by close of business  
14 Friday and then I will issue a ruling.

15 I have to run back to a trial now, so I have to cut  
16 this short.

17 If anyone needs a copy of this transcript, you can get  
18 that through the court reporter, just go to the web site and  
19 you can take steps to do that. OK.

20 Thanks very much.

21 Have a good day.

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